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No. 98-1688

In the Supreme Court of the United States

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the attempt of petitioners to reinstitute an appeal to the General Services Board of Contract Appeals was untimely because it was not filed within the 90-day limitations period established under the Contract Disputes Act of 1978, 41 U.S.C. 606.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 165 F.3d 1360. The opinion of the General Services Board of Contract Appeals (Pet. App. 22a-44a) is reported at 96-1 B.C.A. (CCH) ¶ 28,122.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613, provides two alternatives for a government contractor to appeal a decision of a contracting officer. First, the contractor may appeal to the agency's board of contract appeals within 90 days from the date of receipt of the contracting officer's decision. 41 U.S.C. 606. Alternatively, the contractor may seek review in the United States Court of Federal Claims by filing an action within twelve months from the date of receipt of the decision. 41 U.S.C. 609(a)(1), (3).

2. a. This case involves petitioners' sale to the General Services Administration (GSA) of an office building in Las Vegas, Nevada. Pet. App. 23a. Following the sale, a dispute arose between petitioners and GSA regarding the structural integrity of the building and petitioners' failure to make required repairs and alterations. *Ibid.* After years of negotiations, the contracting officer issued a final decision on August 21, 1991, demanding $5,195,069 to cover the costs of correcting building deficiencies. *Id.* at 23a, 51a-56a. The decision advised petitioners that they could appeal either to the General Services Board of Contract Appeals (GSBCA) within 90 days or to the United States Court of Federal Claims within one year of receipt.[1] *Id.* at 55a-56a.

On November 19, 1991, petitioners submitted a timely notice of appeal to the GSBCA challenging the contracting officer's final decision. Pet. App. 49a-50a.

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[1] Prior to October 29, 1992, the United States Court of Federal Claims was named the United States Claims Court. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4516. For ease of reference, we employ the current name of the court.

On January 8, 1992, however, petitioners filed a "Withdrawal of Notice of Appeal," which stated that they would pursue review of the contracting officer's decision in the Court of Federal Claims. *Id.* at 24a, 47a-48a. The GSBCA granted petitioners' request on January 22, 1992, and dismissed the appeal without prejudice pursuant to GSBCA Rule 28(a)(1), 48 C.F.R. 6101.28(a) (1991). *Id.* at 45a-46a.

b. Meanwhile, on January 13, 1992, petitioners filed a complaint with the Court of Federal Claims. Pet. App. 3a, 24a. The government moved to dismiss the complaint on the ground that petitioners' election to submit a notice of appeal to the GSBCA foreclosed the court from entertaining the complaint. *Ibid.* The court agreed, holding that, because the GSBCA had jurisdiction to entertain petitioners' claims, the doctrine of election of remedies precludes the exercise of jurisdiction by the Court of Federal Claims. *Ibid.*; see *Bonneville Assocs.* v. *United States*, 30 Fed. Cl. 85, 88 (1993).

Petitioners appealed that decision to the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the dismissal, holding that the election-of-remedies doctrine required petitioners to prosecute their claim in the first tribunal that possessed jurisdiction. Pet. App. 3a-4a; see *Bonneville Assocs.* v. *United States*, 43 F.3d 649, 654-655 (Fed. Cir. 1994). The court of appeals held that, because the GSBCA had properly acquired jurisdiction over petitioners' claims, the election-of-remedies doctrine precluded suit in the Court of Federal Claims. *Ibid.*

3. On December 29, 1994, petitioners filed a notice of appeal seeking to reinstitute their appeal to the GSBCA. Pet. App. 25a. GSA moved to dismiss that appeal, arguing that the previously-dismissed appeal

could not be reinstated after expiration of the 90-day deadline established in the CDA. *Id.* at 26a. Petitioners contended, in response to the government's motion, that their second notice of appeal did not constitute a new action but merely revived their previous appeal, which had been dismissed without prejudice. Petitioners asserted that their second notice of appeal should therefore relate back to the date of their original appeal. *Id.* at 4a-5a. Petitioners relied upon GSBCA Rule 28(a)(2), which provided (at the time their first notice of appeal was filed) that a case dismissed without prejudice shall be deemed to have been dismissed with prejudice if it is not reinstated by the GSBCA within three years of the date of dismissal. *Id.* at 4a; see 48 C.F.R. 6101.28(a) (1991) (Pet. App. 6a). Petitioners claimed that their case should be reinstated because they had sought reinstatement within three years of the original dismissal of their appeal. Pet. App. 4a.

In a divided decision, the Board granted the government's motion to dismiss. Pet. App. 22a-44a. The Board held that a previously dismissed appeal may not be reinstated after the time limitations specified in the CDA have expired—that is, after 90 days from the date of receipt of the contracting officer's final decision. The Board concluded that, because petitioners voluntarily caused their appeal to be dismissed, they were placed in the same position as if the first appeal never had been filed. *Id.* at 36a. The Board therefore concluded that the second filing did not relate back to the date of the first appeal. *Ibid.*

4. The Federal Circuit affirmed the GSBCA's decision. Pet. App. 1a-14a. The court of appeals gave deference to the interpretation by the GSBCA of its own operating rules and procedures, which is to be

"accepted 'unless it is plainly erroneous or inconsistent with regulation.'" *Id.* at 9a (quoting *Data General Corp.* v. *Johnson*, 78 F.3d 1556, 1561 (Fed. Cir. 1996)). The court held that the GSBCA had not erred in interpreting its rules governing "dismissal without prejudice in the same way the federal courts would have treated" a dismissal without prejudice under the similar provisions of Rule 41(a) of the Federal Rules of Civil Procedure (Pet. App. 9a).

The court rejected petitioners' argument that the GSBCA improperly employed a "legal fiction" in concluding that the voluntary withdrawal of the original appeal left the situation as if the action had never been filed. Pet. App. 10a. The court held that, because petitioners' attempt to reinstate their appeal after the 90-day period for filing the appeal had run was untimely, "the Board properly refused to permit reinstatement of the appeal because of lack of jurisdiction to entertain it" (*ibid.*). The court also rejected petitioners' argument that the appeal should be allowed to proceed by equitably tolling the limitations period set forth in the CDA. *Id.* at 10a-14a. The court succinctly explained that "[w]hat happened here falls far short of the situations in which equitable tolling has been applied." *Id.* at 12a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decision of any other court, and is based upon the application of settled legal principles to the specific facts of this case by the appellate court that Congress has entrusted to review CDA disputes. See 28 U.S.C. 1295(a)(3), (10); 41 U.S.C. 609. Further review is therefore not warranted.

1. Contrary to petitioners' contention (Pet. 8), the GSBCA did not employ a "legal fiction" in concluding

that the second notice of appeal was untimely. Instead, the Board simply determined that, because petitioners voluntarily dismissed their original appeal, they could not commence a second, untimely appeal nearly three years later. Pet. App. 33a-36a. The GSBCA noted that the 90-day limitations period for commencing an appeal under the CDA is jurisdictional and must be strictly construed. *Id.* at 35a. The GSBCA further noted that it lacks power, either by rule or order, to waive or extend a limitations period established by statute. *Id.* at 36a.[2]

As the court of appeals explained, petitioners could have protected their right to reinstate their appeal by moving to suspend it pending disposition of their attempted alternative suit in the Court of Federal Claims. Pet. App. 7a. Because they instead dismissed their original appeal, however, the GSBCA properly determined that it lacked jurisdiction to reinstate it after the statutory 90-day period had expired. This fact-specific application of the plain language of the statute of limitations creates no conflict and does not warrant further review.

2. Petitioners contend, in the alternative, that the 90-day limitations period established in the CDA should be equitably tolled. Pet. 10-13. The decision of this Court in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), on which petitioners principally rely, does not support petitioners' argument. Instead, as

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[2] Moreover, as the Federal Circuit correctly held, the then-applicable version of GSBCA Rule 28(a)(2), upon which petitioners rely, did not entitle a party whose appeal was voluntarily dismissed without prejudice to automatic reinstatement of the appeal at any time within three years of the dismissal. Pet. App. 8a. Instead, Rule 28(a)(2) simply set forth "the time and circumstances under which a without prejudice dismissal became one with prejudice." *Ibid.*

this Court emphasized in *Irwin* and in subsequent cases as well, equitable tolling of statutory time limits is inappropriate when "it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 118 S.Ct. 1862, 1868 (1998). See also *United States* v. *Brockamp*, 519 U.S. 347, 352 (1996) (equitable tolling inappropriate when the statute contains specific directions such as "30 days from filing"); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95.

Congress clearly evidenced its intention that the limitations period of the CDA be strictly applied by establishing specific time limits for different categories of appeals from a contracting officer's final decision: 90 days for appeal to the administrative appeals board; one year for appeal to the Court of Federal Claims. 41 U.S.C. 606, 609. Congress manifested its intent not to allow exceptions from these specific periods of limitation by specifying in Section 605(b) of the CDA that "[t]he contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is *timely* commenced as authorized by this chapter." 41 U.S.C. 605(b) (emphasis added).

Petitioners cite no authority for their proposition that "equitable tolling does apply to the Contract Disputes Act" (Pet. 10). The Federal Circuit, however, found it unnecessary to decide that issue because, even assuming the doctrine could apply under this statute, it found equitable tolling to be unwarranted on the facts of this case. Pet. App. 11a. As the court properly held, petitioners' failure to timely prosecute this appeal was not the result of affirmative government misconduct or incorrect legal advice provided by the GSBCA or the contracting officer. On the contrary, petitioners' decision to withdraw their original appeal was based upon

their own erroneous legal analysis of the jurisdiction of the Board. *Id* at 12a.

Petitioners have been represented by counsel throughout these proceedings. This is not a case in which the party asserting equitable tolling is "without any fault or want of diligence or care on his part." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). Instead, as correctly stated by the court of appeals, petitioners' mistaken belief that they could voluntarily dismiss, and later reinstate, their appeal was "comparable to the 'garden variety claim of excusable neglect' that the Court in *Irwin* held was insufficient to justify equitable tolling" (Pet. App. 13a (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 455)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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